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No. 89-317

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD J. WALL, PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

After the Merit Systems Protection Board held that it had no jurisdiction over petitioner's claim of discriminatory discharge, petitioner filed an action in a federal district court alleging discrimination by the employer agency. The question presented is whether the court of appeals was correct in affirming the district court's dismissal of the action.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A19) is reported at 871 F.2d 1540. The memorandum and order of the district court (Pet. App. A20-A28) is reported at 637 F. Supp. 90. The initial opinion of the Merit Systems Protection Board (Pet. App. A29-A35) is unreported; the Board's order denying the petition for review of the initial decision (Pet. App. A36-A37) is summarily reported at 27 M.S.P.R. 647.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1989. The court of appeals denied a petition for rehearing en banc on May 24, 1989. The petition for a writ of certiorari was filed on August 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the Department of Health and Human Services (HHS) as an Intergovernmental and Congressional Affairs Specialist from 1973 to September 28, 1984. Pet. App. A21. On September 18, 1984, HHS informed petitioner of its decision to remove him from his position effective September 28, 1984. *Ibid.* Thereafter, petitioner conferred with HHS Employee Relations Specialists concerning his retirement rights. *Ibid.* During these meetings, petitioner discussed his desire to protect his employment record, to obtain timely retirement benefits, and to preserve his insurance coverage. *Id.* at A33-A34. He agreed to select a retirement date, and inquired as to the last possible day he could retire prior to his removal. He was told that he could retire on September 28 and that if he did so, the separation would be processed as a retirement rather than a removal for cause. *Id.* at A31-A32. On September 27, 1984, petitioner filed a Standard Form 50, requesting separation from employment by retirement effective September 28, 1984. *Id.* at A30. HHS processed petitioner's removal as a retirement.

2. Petitioner filed an appeal with the Merit Systems Protection Board (MSPB or Board), alleging that his retirement was involuntary because HHS had decided to remove him for cause and because the Employee Relations Specialists did not inform him that retiring on September 28 would cause him to lose his appeal rights. Pet. App. A29-A31. After reviewing the record and hearing the testimony of petitioner and the Employee Relations Specialists, the Board determined that the retirement was voluntary.[1] The Board

[1] The Board rejected petitioner's claim that the agency's decision to remove him rendered his retirement involuntary, noting that "the courts have repeatedly upheld the voluntariness of resignations and retirements where they were submitted to avoid possible removal for cause." Pet.

held that since there had been no adverse action taken against petitioner by HHS, it had no jurisdiction to hear petitioner's appeal. *Id.* at A29, A30-A34.

3. Petitioner appealed the Board's decision to the Federal Circuit pursuant to 5 U.S.C. 7703(b)(l) (1982). Pet. App. A21. Petitioner also filed an action in the United States District Court for the District of Kansas, claiming that his termination amounted to age and handicap discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Pet. App. A20-A21. The Federal Circuit stayed the proceedings before it pending the outcome of the district court action. *Id.* at A21.

The district court observed that it had jurisdiction over petitioner's claim under 5 U.S.C. 7703(b)(2) (1982) only if petitioner had presented a "mixed" claim – that is, a claim that was appealable to the MSPB and that alleged discrimination by the agency. Otherwise, "the Federal Circuit has exclusive jurisdiction." Pet. App. A24. The court then noted that, although petitioner's claim included an

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App. A30 (citations omitted). The Board observed that petitioner's resignation would be binding only if his removal was for good cause, but held that the good cause requirement was satisfied unless petitioner could show "that the agency knew or believed that the removal action could not be substantiated." *Id.* at A31 (citations omitted). Because petitioner had not met this standard, the Board found that "the decision of the appellant to retire was not, at least legally, rendered involuntary simply because appellant was to be removed." *Ibid.*

The Board also found that, although the Employee Relations Specialists did not inform petitioner that his decision to retire on the day he was to be terminated would preclude any appeal of the agency's action (see Pet. App. A31 n.2, A32-A33), he nonetheless was informed that a retirement on the date he selected would result in his separation "be[ing] processed as a retirement action, *not* a removal for cause." Accordingly, the Board found that petitioner's decision to retire was not rendered involuntary by any misrepresentation. *Id.* at A33.

allegation of discrimination, the case was "not a 'mixed' case falling within the provisions of section 7702" because "[t]he MSPB made a factual finding that plaintiff's retirement was voluntary," and "[a]s a matter of law, a voluntary retirement is not subject to the MSPB's jurisdiction." *Ibid.* Therefore, the court concluded, the Federal Circuit had exclusive jurisdiction to review the Board's determination that the resignation was voluntary and that the Board lacked jurisdiction over the claim. *Ibid.* The district court dismissed the claim for lack of jurisdiction. *Id.* at A28.

4. Petitioner appealed the district court's decision to the Tenth Circuit, and the Tenth Circuit affirmed. Pet. App. A4-A19. The court of appeals majority agreed with the district court's reading of Section 7703(b)(2) as requiring that where "an employee's appeal to the [MSPB] is 'not appealable' under the statute, and the Board does not consider the employee's claim of discrimination on the merits, review of the Board's determination that it lacks jurisdiction to hear the employee's claim lies exclusively in the Federal Circuit." Pet. App. A5.[2] The majority concluded that petitioner's de novo action in the district court "was properly dismissed." *Id.* at A7.

Judge Seymour dissented, concluding that "[r]equiring Wall to appeal the Board's resolution of this issue in the Federal Circuit deprives him of de novo review of his discrimination claim in district court, a result contrary to

[2] The court of appeals also stated that, if the Federal Circuit on appeal "reverses the Board's determination that Wall's retirement was voluntary, the matter will then be remanded to the Board to hear Wall's discrimination claim on the merits." Pet. App. A5. If the MSPB on remand issued a ruling adverse to petitioner, petitioner could then file an action in district court. "It would seem to follow," the court concluded, "that should the Federal Circuit on appeal uphold the Board's finding that Wall voluntarily retired, such would rule out any claim of discrimination." *Id.* at A6.

statutes." Pet. App. A15. She noted that the majority's analysis would result in a "person in Wall's position [being] unable to raise his discrimination claim in any judicial forum." *Id.* at A17. She concluded that there was no "compelling statutory construction or policy argument" to support the majority's view that Congress intended federal employees to be "without a remedy in this situation." *Ibid.*

Judge Seymour also acknowledged the government's argument that the district court had properly dismissed the action because petitioner had failed to fulfill the prerequisite of exhausting his administrative remedies by filing a claim with the agency.[3] Pet. App. A17. Although the thirty-day period established by regulation for presenting his claim of discriminatory termination to HHS had long since expired (see 29 C.F.R. 1613.214(a)), Judge Seymour concluded that petitioner had satisfied the requirement of administrative exhaustion under the regulations by following an "alternative procedure[ ] for pursuing administrative relief"—filing a timely claim with the MSPB under 5 U.S.C. 7702(a)(1). Pet. App. A18.

ARGUMENT

This case does not warrant further review. Because the district court properly dismissed petitioner's action for discrimination, the court of appeals' decision affirming dismissal of that action was correct. Moreover, petitioner still has ample opportunity to obtain what he seeks: con-

[3] See 42 U.S.C. 2000e-16(c), as incorporated by reference in the Rehabilitation Act of 1973 (29 U.S.C. 794a); Section 15(d) of ADEA, 29 U.S.C. 633a(d) (requiring that a complaint be filed with the agency, or that the EEOC be notified, before an action is filed in federal court). See also 29 C.F.R. 1613.212-1613.214 (requiring that a complaint to the agency be filed within thirty days of the discriminatory personnel action).

sideration on the merits of his claim of age and handicap discrimination.

1. Although we do not fully agree with the court of appeals' reasoning,[4] its affirmance of the district court's dismissal of petitioner's action is correct because petitioner did not fulfill the prerequisites for his lawsuit. The relevant regulations require that before filing a suit alleging age or handicap discrimination, a claimant must consult with an Equal Employment Opportunity Counselor and must file a complaint with the employing agency within 30 days of the alleged discriminatory event. 29 C.F.R. 1613.213, 1613.214. Petitioner failed to comply with these requirements, and the district court therefore could not have entertained his lawsuit at the time it was filed.[5]

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[4] The court of appeals correctly concluded that, if the MSPB lacked jurisdiction over petitioner's action, his claim was not a "mixed" claim falling under Section 7702(a). The court then reasoned that, because Section 7703(b)(2) confers district court jurisidiction over "mixed" claims, it follows that Section 7703(b)(2), *ex proprio vigore*, deprives the district court of jurisdiction over any discrimination claim filed with the MSPB that turns out not to be a "mixed" claim within the Board's jurisdiction. We believe, however, that such a claim—although mistakenly characterized as mixed by the complainant—is in fact a "pure" discrimination claim over which the district court has de novo jurisdiction (subject to administrative exhaustion requirements) under Section 717(c) of Tit. VII, 42 U.S.C. 2000e-16(c), as applied to the Rehabilitation Act of 1973, and Section 15(c) of ADEA, 29 U.S.C. 633a(c). See Pet. App. A22-A23.

[5] Contrary to Judge Seymour's conclusion in dissent, consideration of petitioner's claim by the MSPB did not suffice to satisfy the requirement of administrative exhaustion. Section 1613.421 of 29 C.F.R., cited by Judge Seymour as authority for her conclusion that filing with the MSPB is sufficient, relates only to actions authorized to be filed in district court by 5 U.S.C. 7702 (1982)—that is, to "mixed" claims over which the MSPB has jurisdiction and to which the MSPB has given consideration on the merits. By definition, then, the regulation does not apply to this case if the MSPB was correct in its ruling.

2. However, petitioner still has ample opportunity to obtain consideration of the merits of his claim of discriminatory discharge.

a. Petitioner may elect to pursue his appeal of the MSPB decision to the Federal Circuit. Reversal by the Federal Circuit of the MSPB's ruling that petitioner's retirement was voluntary would result in a remand to the MSPB for consideration of petitioner's "mixed" discrimination claim on the merits. If the MSPB rejects the "mixed" claim, petitioner could then bring suit in district court under 5 U.S.C. 7703(b)(2) (1982). See 29 C.F.R. 1613.421.

b. If petitioner does not pursue his appeal to the Federal Circuit, or if the Federal Circuit upholds the MSPB's jurisdictional ruling, petitioner would then be able to fulfill the prerequisites to the filing of an independent district court action for discrimination. Under the relevant regulations, petitioner is entitled to an enlargement of time within which to file his complaint with the agency: 29 C.F.R. 1613.214(a)(4) states that "[t]he agency shall extend the time limits in this section when the complainant shows that * * * [he] was prevented by circumstances beyond [his] control from submitting the matter within the time limits." In this case, petitioner elected in good faith to proceed under 5 U.S.C. 7702(a)(1) by filing what he thought was a "mixed" adverse action-discrimination claim with the MSPB. Based on its own factual findings, rather than any misfeasance of petitioner, the MSPB determined that the claim was not "mixed" and that it therefore had no jurisdiction. (Assuming that the MSPB's decision is correct, petitioner's claim is an "unmixed" discrimination claim that should have been filed directly with the district court following agency consideration.) These circumstances warrant an enlargement of time under 29 C.F.R. 1613.214 once the MSPB proceedings and any judicial review of these proceedings have concluded. Petitioner may then file a complaint with the

agency and, if necessary, proceed to file a discrimination claim in district court within the applicable period. See 42 U.S.C. 2000e-16(c)(setting forth limitations period applicable to the filing of a district court action following complaint to the agency, incorporated by reference in Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. 794a. See also Section 15(c) of ADEA, 29 U.S.C. 633a(c)).

3. Nothing in the decisions below precludes de novo consideration of whether, notwithstanding his decision to retire, petitioner was the victim of unlawful discrimination under ADEA or the Rehabilitation Act of 1973. The court of appeals held only that there was no jurisdiction to bring an action under Section 7703(b)(2), not that there was no jurisdiction under the relevant Sections of ADEA or the Rehabilitation Act of 1973—the provisions under which any second action would be brought. Also, if petitioner has properly exhausted his administrative remedies by the time he files again, the obstacles to the present action will not exist. Thus, an affirmative defense of res judicata would be unwarranted, and would not foreclose petitioner's later action challenging the agency's conduct.[6]

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[6] Nor would the MSPB's determination (or the Federal Circuit's affirmance) that petitioner's retirement was "voluntary" necessarily preclude his litigation in district court of the issue whether his separation from the agency nevertheless qualified as a discriminatory "constructive discharge," or whether the agency otherwise discriminated against him in violation of ADEA or the Rehabilitation Act of 1973. Compare Pet. App. A6 (court of appeals majority, stating in dictum, that "[i]f Wall, in fact and in law, voluntarily retired, he cannot argue that his termination was the result of agency discrimination").

It is true that petitioner cannot collect back pay or win reinstatement unless the court finds that he has been constructively discharged, see, *e.g.*, *Muller* v. *United States Steel Corp.*, 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975), and that his decision to retire would be pertinent to the issue of whether a constructive discharge had taken place. Cf. *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986)

Since the dismissal below was correct, and petitioner may still receive all of the relief he ultimately seeks, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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("the question on which constructive discharge cases turn is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign"). However, the legal standard governing the MSPB's determination whether a decision to retire is "voluntary" may differ from the legal standard for determining whether a discriminatory discharge has occurred. See Pet. App. A30-A31, and compare the cases there cited (decision to retire to avoid termination for cause is deemed voluntary unless the "appellant • • • show[s] that the agency knew or believed that the removal action could not be substantiated") with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting forth order and burden of proof for discrimination claims under Title VII). Thus, the MSPB's ruling on the former question, even if upheld by the Federal Circuit, may not be preclusive on the latter.

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